UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/077/ JAB/2009/035
Judgment No.: UNDT/2010/044
Date: 19 March 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

D'HOOGE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Notice: This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The applicant contests the decision of the Officer-in-Charge (OIC) of the Office of Human Resources Management (OHRM) to end his employment with the United Nations following an investigation of an anonymous complaint alleging that the applicant had misrepresented his education qualifications and his prior employment history when applying for a position in the Department of Security and Safety (DSS). A preliminary investigation was commenced under ST/AI/371 but disciplinary proceedings were never taken. I found this application receivable (UNDT/2009/018). The present judgment addresses whether the applicant's contract could have been ended under the general law otherwise than pursuant to termination under staff regulation 9.1 or dismissal under chapter X of the Staff Rules and whether he was afforded due process rights. The respondent submitted at the hearing that the Assistant Secretary-General for OHRM (ASG/OHRM) had the authority to cancel the applicant's contract in light of anterior facts and alleged misrepresentations identified during the investigation. It was agreed by the parties that, should the Tribunal find that the decision-maker did not have the power to cancel or terminate the applicant's appointment, it being conceded that the decision was not made by the Secretary-General, no further proceedings would be required with respect to the issue of liability. However, a further hearing on compensation may be necessary. The applicant was placed on extensive service leave with full pay whilst the investigation was proceeding. This was not a decision of the Secretary-General and this judgment deals also with the question of its legality.

2. Pursuant to case management procedures, the parties submitted a list of proposed exhibits. Because of the agreement as to the question of liability, these were not tendered and, accordingly, are not part of the case. The documents considered for the purpose of this judgment are the letter of termination dated 28 April 2008, the notifications of special leave with full pay dated 14 September and 7 December 2007 and 10 March 2008, the request for administrative review and the

Administration's response. The investigation report was also considered, but only for the purpose of understanding the respondent's submissions on the nature of the misrepresentations relied on. In accordance with the agreement of counsel on the liability issues, it was unnecessary to determine the adequacy or otherwise of the report and the truth of the conclusions it expressed. I also took into account, again only for the purpose of evaluating the respondent's submissions and not as evidence of the truth of the assertions made, the outline dated 20 November 2009 of proposed evidence of one of the investigators. These documents will be marked as exhibits in the appropriate way in due course.

Legal instruments

3. ST/SGB/2008/4 (former staff regulations), which applied at the relevant time, provides as follows:

> **Article IX**
>
> **Separation from service**
>
> **Regulation 9.1**
>
> (a) The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or if he or she is, for reasons of health, incapacitated for further service.
>
> The Secretary-General may also, giving his reasons therefor, terminate the appointment of a staff member who holds a permanent appointment:
>
> (i) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;
>
> (ii) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment.

No termination under subparagraphs (i) and (ii) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Secretary-General.

Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment, if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

(b) The Secretary-General may terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in subparagraph (a) above, or for such other reason as may be specified in the letter of appointment.

…

4. ST/SGB/2002/1 (former staff rules), as amended by subsequent issuances (including ST/SGB/2006/1) and applicable at the relevant time, provides as follows:

Rule 105.2

Special leave

(a) (i) Special leave may be granted at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the Secretary-General may prescribe. In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization.

(ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted.

…

Chapter IX

SEPARATION FROM SERVICE

Rule 109.1

…

(b) *Definition of termination*

A termination within the meaning of the Staff Regulations is a separation from service initiated by the Secretary-General, other than

retirement at the age of sixty years or more or summary dismissal for serious misconduct.

…

Chapter X

DISCIPLINARY MEASURES AND PROCEDURES

Rule 110.1

Misconduct

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

…

Rule 110.3

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms:

(i) Written censure by the Secretary-General;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for within-grade increment;

(iv) Suspension without pay;

(v) Fine;

(vi) Demotion;

(vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;

(viii) Summary dismissal.

…

Rule 110.4

Due process

(a) No disciplinary proceedings may be instituted against a staff member unless he or she has been formally notified, in writing, of the allegations against him or her and of the right to seek the assistance of

counsel in his or her defence at his or her own expense, and has been given a reasonable opportunity to respond to those allegations.

(b) No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate, except that no such advice shall be required:

(i) If referral to the Joint Disciplinary Committee is waived by mutual agreement of the staff member concerned and the Secretary-General;

(ii) In respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service.

(c) In cases of summary dismissal imposed without prior submission of the case to a Joint Disciplinary Committee in accordance with subparagraphs (b)(i) and (ii), the staff member or former staff member concerned may, within two months of having received written notification of the measure, request that the measure be reviewed by such a Committee. A request shall not have the effect of suspending the measure. After the advice of the Committee has been received, the Secretary-General shall decide as soon as possible what action to take in respect thereof. An appeal in respect of such a decision may not be submitted to the Joint Appeals Board.

(d) An appeal in respect of a disciplinary measure considered by a Joint Disciplinary Committee pursuant to either paragraph (b) or (c), or in respect of financial responsibility for gross negligence pursuant to rule 110.5, shall be submitted directly to the United Nations Administrative Tribunal.

5. ST/AI/234/Rev.1 (Administration of the staff regulations and staff rules) provides as follows:

Matters reserved to the Secretary-General

4. Matters reserved to the Secretary-General are listed in annex I. All matters for the decision of the Secretary-General will be submitted to him through the Under-Secretary-General for Administration and Management, to whom the Secretary-General may delegate from time to time such authority in these matters as he deems advisable.

Matters within the authority of the Assistant Secretary-General for Human Resources Management

> 5. Matters within the authority of the Assistant Secretary-General for Human Resources Management are listed in annex II. The Assistant Secretary-General may delegate the exercise of this authority within the Office of Human Resources Management. …
>
> Annex I
>
> MATTERS RESERVED TO THE SECRETARY-GENERAL
>
> …
>
> | | |
> |---|---|
> | Regulation 9.1 | Termination of appointments (except as provided in annexes II and V) |
>
> Annex II
>
> MATTERS WITHIN THE AUTHORITY OF THE ASSISTANT SECRETARY-GENERAL FOR HUMAN RESOURCES MANAGEMENT
>
> | | |
> |---|---|
> | Rule 105.2(a) | Grant of special leave with full or partial pay, other than for jury service, and grant of special leave without pay for more than three months (except as provided in annex V) |
> | Regulation 9.1 | Termination of appointment for reasons of health

Termination of appointments of staff members at Headquarters within the purview of subsidiary panel on its recommendation (in consultation with Office of Legal Affairs) other than termination of permanent appointments for unsatisfactory services |

Facts

6. In September 1995 the applicant started working on secondment from his government as an investigator at the P-3 level at the International Criminal Tribunal for Former Yugoslavia (ICTY). He was engaged on a fixed-term contract as an investigator until 31 August 1997, when his contract was not renewed. While working as investigator, on 22 April 1997 the applicant was administratively reprimanded in writing by the Deputy Prosecutor of the ICTY for "insubordination"

and "a serious error of judgment". Subsequent to the expiry of his fixed-term contract, he was engaged for a further period of three months, until 30 November 1997, as a consultant.

7. In January 1998 the applicant returned to work for his government, where he remained until January 2000. In March 2000 again on secondment, the applicant joined the Organization for Security and Co-operation in Europe (OSCE). In October 2001 the applicant was appointed Director of the Police Development Unit in the OSCE Spillover Mission to Skopje, Macedonia. In September 2003 the applicant was appointed Head of Mission/Police Commissioner for the European Union Police Mission Proxima, Skopje, Macedonia. In February 2005 the applicant returned to his home country.

8. In August 2005 the applicant applied for a vacancy in DSS through the UN Galaxy system. His personal history profile (PHP) contained in the University Degree window a reference to his Police Diploma which was not, in fact, a university degree. He undoubtedly possessed other university degrees, including a Master's degree in Criminology. It was not suggested that, had he disclosed the diploma as another tertiary qualification without describing it as a degree, this would have had any effect at all on the likelihood of his appointment. The PHP did not mention that the applicant had served in ICTY. However, on 16 October 2006 a communication from the police department of his home government, sent at the request of OHRM, set out a full curriculum vitae, including the applicant's employment with the ICTY. On 7 January 2007 he entered on duty as Chief, Protection Coordination Unit (PCU) in the Department of Security and Safety.

9. The applicant was employed on a fixed-term appointment at the P-4 level, set to expire on 6 January 2009. The letter of appointment stated that the appointment was offered "on the basis, inter alia, of [his] certification of the accuracy of the information provided by [him] on the personal history form".

10. On 6 September 2007 the Office of the Under-Secretary-General, DSS, received an anonymous letter alleging that the applicant was unsuitable for the post due to serious violations and unprofessional behaviour in previous employment, and that he also "overstates his academic qualifications, some of which he does not have". On 12 September 2007 the Under-Secretary-General, DSS, directed the Internal Affairs Unit (IAU) of DSS to conduct a preliminary investigation.

11. On 14 September 2007 the applicant was notified in writing by the OIC/OHRM that he was being placed on special leave with full pay pending the outcome of the investigation. On 17 September 2007 the Deputy to the Under-Secretary-General of DSS sent a memorandum to a Human Resources Officer, Executive Office of DSS, and Security Coordination Officer, IAU, requesting them to conduct an investigation into the allegations against the applicant. The applicant was interviewed by IAU on 30 and 31 October 2007 and 28 January 2008.

12. On 20 February 2008 IAU submitted its investigation report in which certain findings and conclusions were expressed. On 28 April 2008 the applicant was sent the following letter of termination, signed by the OIC/OHRM –

> Dear [applicant],
>
> On 13 March 2008 … Deputy to the Under-Secretary-General for Security and Safety (DSS), informed the Office of Human Resources Management (OHRM) that DSS had completed its review of your case and that this review found that facts anterior to your appointment that are relevant to your suitability for the post of Chief, Protection Coordination Unit, DSS, came to light after your appointment.
>
> DSS's review of your case indicates that DSS has now learned that you were reprimanded on 22 April 1997 by the ICTY for improper behaviour and that your fixed-term appointment at the ICTY was not renewed beyond 31 August 1997 because ICTY had found that you were "no longer able to investigate crimes which have been allegedly committed by Croatian perpetrators, as [you had] become compromised by [your] actions during investigations in Croatia". Similarly, according to DSS, the record indicates that you showed poor judgment on a number of occasions during your tenure with the OSCE. Finally, DSS found that the "Police Diploma" you listed in the seven-

> page Personal History Profile you completed in September 2005 is not a university degree and cannot be considered as equivalent to a university degree, as confirmed by [the Ministry of Justice] in a letter to DSS dated 13 December 2007.
>
> The record establishes that, at the time of your selection, DSS was unaware of the reasons for your leaving the posts you had held prior to 2001. In the absence of this information, DSS was misled into selecting you as Chief, Protection Coordination Unit, DSS, which entails the functions of overseeing and coordinating the deployment of close protection assets throughout the United Nations and liaising with the law enforcement agencies of Member States in order to ensure effective security arrangements for the movement of senior United Nations officials. According to DSS, these functions require access to very detailed and sensitive information and therefore require that the person carrying out these functions possess the highest degree of personal integrity and competence. Had DSS been aware of the reasons for your leaving the ICTY and the OSCE, it would have deemed you unsuitable for employment in DSS.
>
> Based on the foregoing, the Secretary-General has decided that your appointment be terminated in accordance with staff regulation 9.1(b) and Annex III of the Staff Regulations. Please be advised that the Secretary-General has authorized compensation in lieu of the notice period in your case, in accordance with staff rule l09.3(c) and that the termination of your appointment will be effective upon your receipt of this letter. A copy of this letter will be placed in your official status file.

13. The applicant requested an administrative review of the decision to terminate his appointment on 14 May 2008. The applicant was not given a copy of the investigation report or the material upon which it was based and sought information as to the basis for the allegations set out in the notice of termination so that he could deal with them for the purposes of the review. He suggested that certain (quite reasonable) enquiries be made which would vindicate his conduct and character. His request for the report and suggestions about further enquiries were ignored and the decision to terminate the applicant was confirmed by letter from OHRM dated 21 June 2008 without further correspondence. (The sufficiency of the review is discussed below.) On 30 June 2008 the applicant repeated his request for a copy of the investigation report. The report was provided on 6 August 2008, but without

attachments. Redacted copies of the attachments were supplied, at my direction, on 2 March 2010.

Applicant's submissions

14. The applicant's rights were violated during the investigation because he was not informed of the allegations and was not advised at any of his interviews that he had the right to be assisted by a legal representative. IAU acted outside its terms of reference with regard to its findings regarding an incident that occurred twelve years ago at the ICTY. It is a violation of due process for the respondent to base its decision to terminate the applicant on documents with which the applicant had not been provided.

15. Having regard to the reduced scope of the case as indicated above (and my conclusions in respect of it), it is not necessary to set out the applicant's extensive submissions on the alleged weaknesses of the investigation, or the denial of due process. Accordingly, the following summary is confined to the lawfulness of the decision to place him on special leave and to terminate his contract.

16. The decision to terminate the applicant's appointment was *ultra vires* as the ASG/OHRM does not have the delegated authority to terminate appointments except for specific instances listed in Annex II of ST/AI/234/Rev.1. The authority to terminate the applicant's appointment was solely with the Secretary-General.

17. The respondent has failed to state a legal basis for an authority to cancel employment contracts. Even if the Secretary-General had authority to cancel appointments, there is no evidence that the Secretary-General delegated it to the ASG/OHRM. The *ex post facto* claim that the applicant's appointment was cancelled (as opposed to terminated) finds no support in the evidence and is an attempt to avoid the adverse consequences of the findings that the decision to terminate the applicant's contract was *ultra vires*. The contested decision, as well as the reply to the request for administrative review and the respondent's initial submission to the Tribunal,

referred to termination, not cancellation. The respondent has not given an explanation for the fact that the applicant was paid compensation in lieu of notice of termination, in addition to termination indemnities paid under the staff rules.

18. The applicant's placement on special leave was *ultra vires* as it is a matter reserved to the Secretary-General for decision. By Annex II of ST/AI/234/Rev.I, the Secretary-General delegated authority to *grant* special leave to the ASG/OHRM. However, Annex II does not delegate authority to *place* a staff member on special leave pending the outcome of the investigation. Therefore, the matter remained solely within the authority of the Secretary-General. In any case, even if this authority was delegated to the ASG/OHRM, there is no evidence that it was delegated further within OHRM, even if this were legally permissible. The two continuances of special leave were separate subsequent decisions and also *ultra vires*.

19. The applicant seeks the following relief: summary dismissal of the respondent's claim that the appointment was cancelled; retroactive reinstatement; compensation for the manifold violations of his rights to due process; expunging of all adverse information from his official status file and any other official dossiers in the possession of the Organization.

20. Following the 12 January 2010 hearing, the applicant sought a summary judgment following the respondent's concession that the decision-maker did not have the authority to terminate the applicant's appointment.

Respondent's submissions

21. The investigation report contained facts which, had the respondent been aware of them, would have precluded the applicant's appointment and demonstrated that he was unsuitable for the position. Respondent was entitled to pursue either disciplinary measures or to take other permissible steps under the rules. This principle was recognized in *Sam-Thambiah* (2005) UNAT 1214, where similar factual issues, such as misrepresentations made on the applicant's PHP, were raised. In this case, since

the investigation concerned conduct of the applicant prior to his service with the Organization, the matter was more appropriately dealt with as a termination for anterior facts under staff regulations 9.l(b) and 9.1 (a)(ii).

22. The anterior facts relied upon in the contested decision were reliable and probative of the applicant's suitability for the post. The decision to terminate or cancel the applicant's contract was not based on the entire DSS report but on two categories of facts: the anterior facts comprising his being reprimanded at the ICTY, the non-renewal of his contract because of his becoming "compromised" in respect of a significant part of his investigative duties and his demonstration of "poor judgment" whilst with OSCE; together with the misrepresentation of his academic qualifications and the non disclosure of his prior employment with the ICTY.

23. Misrepresentations give rise to legal consequences independent of the possibility that the Secretary-General may elect to terminate the appointment pursuant to staff regulation 9.1(b). Specifically, where a staff member procures an appointment by misrepresentation, the appointment may be considered void from the outset or may be cancelled, as stated in the certification statement the applicant agreed to in the Galaxy system.

24. There was no enforceable contract in this case: (i) there was no meeting of the minds due to the applicant's misrepresentations, (ii) the applicant cannot procure rights by misrepresentation or fraud, (iii) a contract procured by misrepresentation or fraud may be cancelled by notice to the other party of the facts that give rise to the cancellation of the contract, which happened in this case, (iv) the ASG/OHRM, within her general powers, had the authority to cancel the appointment and recognize that the contract was void from the outset.

25. It is a well-established principle of contract law that a contract induced by fraud, mistake, or duress is voidable by the party who would not have otherwise entered into the contract (*Shaw's Supermarkets, Inc. v. Delgiacco* 410 Mass. 840; *Devine v. R.A. Sutermeister*, 724 F.2d 1558).

26. The policy and practice of the Organization regarding fact-finding investigations is that a staff member is not entitled to be informed in writing of any allegations made against him or of his or her right to respond to them, nor does he or she have a right prior to initiation of a disciplinary process to be provided with a copy of documents evidence of alleged misconduct. The applicant also does not have a right to be informed of the nature and scope of the investigation. These rights attach during formal disciplinary proceedings, that is, after a formal charge of misconduct is made against the staff member pursuant to sec 6 of ST/AI/371 (Revised Disciplinary Measures and Procedures). During the preliminary investigation stage, a staff member who is interviewed has a right to be given an opportunity to put forward his or her version of the facts and has a right to be given a reasonable opportunity to present evidence or witnesses. The applicant was given an opportunity to put forward his version of the facts and to present evidence or witnesses; therefore, the applicant's due process rights were observed during the preliminary investigative stage.

27. The Administration was under no obligation to provide the applicant with documents from DSS because no disciplinary proceeding was initiated pursuant to sec 6(b) of ST/AI/371. The applicant would only have been entitled to this documentation pursuant to sec 6(b) and only if he had been charged with misconduct. Upon receiving the results of the investigation, the ASG/OHRM proceeded to cancel and/or terminate the applicant's contract. Accordingly, no further steps were taken under ST/AI/371 and disciplinary proceedings were not initiated. In these circumstances the various additional due process rights contemplated under sec 6 of ST/AI/371, where a charge of misconduct is made against the staff member, do not apply.

28. The decision to place the applicant on special leave was taken pursuant to staff rule 105.2(a). The decision was taken by the Officer-in-Charge, OHRM, acting in the capacity of the ASG/OHRM. Therefore, authority to take the decision was vested in the OIC/OHRM pursuant to ST/AI/234/Rev.1, Annex II, rule 105.2(a). The decisions of 7 December 2007 and 10 March 2008 to extend the applicant's special

leave were notified to the applicant by the Director of the Division of Operational Development of OHRM and the OIC of the said Division. Although these officers were not acting in the capacity as the ASG/OHRM, the initial decision of the ASG/OHRM contemplated that special leave could continued until completion of the investigation and, accordingly, the decisions of 7 December 2007 and 10 March 2008 may be considered to be notifications of the continuance of special leave and not independent decisions taken under staff rule 105.2(a).

The administrative review

29. It is obvious that, without the report or at least detailed particulars of the grounds relied on by the decision-maker, the applicant was at an insuperable and unfair disadvantage in his ability to criticise its findings and justify his claim for review. However, he dealt with each identified ground for termination in a reasonable, if summary, way, largely contradicting the allegations and by bringing relevant facts into account, attempting to refute the allegations. The response to the applicant's request did not condescend to mention any of the applicant's criticisms of the conclusions of the investigation. The so-called "considerations" commenced with the statement that "the record shows that the decision to terminate your appointment was made with due regard to your due process rights". In fact there was no regard at all paid to the applicant's "due process rights": first, the letter of termination refers in general terms to his being "compromised" without specifying the facts or how he was responsible for them, and to "showing poor judgment" whilst with OSCE, again not identifying the alleged poor judgment; secondly, he was never shown a copy of the investigation report or given an opportunity to comment on its conclusions, perhaps to suggest other witnesses or other evidence not considered; thirdly, he was never even informed or given particulars of the facts upon which it was proposed to terminate him and given an opportunity to respond in a timely way; fourthly, the record to which OHRM referred and upon which it apparently relied was not available to him; and, fifthly – and most egregiously – he was not given an opportunity to be heard on the proposal to terminate him. The bland assertion that

"due regard" was had to his "due process' rights can only be interpreted to mean that, as he had none, "due regard" entailed little or nothing. It is not necessary – in light of my conclusions on other aspects of this sorry case – to finally conclude that there was a substantial breach of the Organization's obligations of good faith and fair dealing to the applicant but it is clear that there is a very strong argument to be made to this effect. The fact that there was no attempt to explain why "due process" had been satisfied when the applicant had raised the unsatisfactory way in which he was treated where the failure to give him any particulars, let alone an opportunity to be heard, was so patent is also troubling.

30. It was, furthermore, unreasonable to determine the request for administrative review in circumstances where, as was obviously true, the applicant required further information in order to make his case. Not only was further information denied him, but the substantive factual matters he relied on were disregarded. The response stated blandly the "allegations were properly investigated ... and you were given an opportunity to give your comments and version of events". It is true that the applicant was interviewed in the course of the investigation but the interviews did not deal with a number of significant parts of the evidence upon which, it appears, the investigators later relied for their conclusions that the applicant had not been candid and concerning the very matters upon which the termination of the applicant's contract was apparently based. (I say "apparently" because it is not possible to be sure what these matters were, having regard to the obscurity, presumably deliberate, of the letter of termination.) The report is replete with innuendo and hearsay as to significant matters with little real analysis of important facts or significant evidence. The point is that the so-called "opportunity" for the applicant to give his version of events could not realistically be evaluated without analyzing the material upon which the investigators relied and the way in which they dealt with it. The proposed evidence to be adduced from one of the investigators by the respondent in the trial states that the applicant was "specifically … informed that it had been alleged that he had omitted facts in his PHP and that his judgment and his integrity were being questioned". If true, this scarcely meets any acceptable standard of specificity.

Particular factual matters were raised with him during interviews, but these were not comprehensive and it appears that many of the applicant's responses were not followed up. The failure of the administrative review to attempt to deal with the factual matters raised by the applicant or assay an even cursory analysis of the report, in my opinion, strongly indicates a failure to undertake any genuine review of the decision in accordance with the requirements of former rule 111.2(a) and to act in accordance with the obligations of good faith towards the applicant. The need for a truly independent analysis was all the more essential given the refusal to provide the applicant with the means of making a detailed submission for himself and in the light of his responses to the investigator's questions.

31. There was also a failure to apply the facts alleged in the notification of termination to the grounds for termination specified in regulation 9.1. The mere fact of administrative reprimand *of itself* could not be an anterior fact (that is, in the absence of the underlying facts) within the meaning of regulation 9.1(a)(ii) since it might or might not have been a disabling fact that "under the standards established in the Charter … precluded appointment"; nor, for the same reason, would all "improper behaviour" that could justify an administrative reprimand fall within that description. Whether the behaviour here characterised as "improper" by the applicant's superiors at ICTY was fairly so characterised was very much a question of fact and degree and the investigation in respect of it is distinctly unimpressive. As to whether the alleged inability to investigate particular offences was concerned because he had become "compromised" by his actions during investigations amounted to a disabling failure to comply with the standards established in the Charter also depended very much upon the circumstances and was a matter of opinion rather than objective fact. The so-called "poor judgment on a number of occasions" might or might not have been disabling facts, depending on what they were, a matter which the anonymous decision-maker did not care to identify. As to the apparent description of the diploma as a university degree, it is difficult to see how, in the absence of any suggestion that this was dishonest, it could have been a disabling circumstance.

Misrepresentation and cancellation of contracts

32. In the common law (more precisely, the law of equity) a party (the contractor) who has been induced to enter into a contract by the intentional misrepresentation by the other contracting party (the contractee) as to a matter that the contractee knows or ought to know is material may bring that contract to an end and, in certain circumstances, the rescission may be *ab initio*. A mere mistake, even as to a fundamental matter, which has not been brought about by the contractee will not justify cancellation (with irrelevant qualifications) unless the contractee has reason to know that the contractor is acting under a mistake or misapprehension and engages deliberately in a course of conduct designed to inhibit discovery of it.

33. Whether it is appropriate to import the common law rules concerning misrepresentation into the jurisprudence of the United Nations is another question which cannot be answered solely by pointing to a lacuna in its legal framework. For example, there may be relevant jurisprudence in the civil law systems in, say, Europe or Asia, which might have adopted a different but quite acceptable approach. In this context, however, it should be noted that the applicable common law principles are based upon the equitable law rules founded upon the concept of good conscience. It is fair to regard this concept as cognate, if not identical, with the concepts of mutual good faith and fair dealing which are implicit conditions of the contract between the United Nations and its employees. The application of these implicit conditions, it seems to me, would be likely to lead to the same destination as that of the common law. Even so, common law learning, with its long history of dealing with conscionability in contractual disputes in their widely differing circumstances, is a useful resource. Sometimes it is necessary to proceed from case to case but it is useful to do this in the context of a coherent structure that has been developed, albeit in a different legal system, in the process of applying fundamentally similar concepts. In other words, because the concepts of conscionability on the one hand and good faith and fair dealing on the other are so closely related, the way in which the former has been applied over time by logical and rational legal reasoning to a wide range of

contractual issues, can usefully inform the approach that the application of the conditions of mutual good faith and fair dealing should have in contractual disputes in the United Nations context. This is obviously the case when one is dealing with protean notions such as good faith and fair dealing. To my mind, a succession of ostensive examples of good faith or bad faith actions, whilst to some degree informative, does not yield the kind of principled outcome that transparency and predictability require of a legal system.

34. Thus, when the decision-maker asks, "What does good faith and fair dealing require me to do?" in circumstances where there is a range of possible and apparently reasonable responses, reference to analogous cases is no doubt useful, providing that they reflect some coherent scheme and are not a mere congeries of instances depending on the threshold of indignation of the particular judge. Accordingly, the identification of a discernable discriminating principle, if possible, should be the aim of the Tribunal. It is this objective that should lead to the exploration of already developed legal systems in which the question in issue has been answered as part of a coherent structure of legal reasoning.

35. The United Nations legal system may be an island, but it does not inhabit its own planet. This is not to say that civil law notions should not be also mined, as it were, for legal resources. Civil law applications of their legal rules cognate to good faith and fair dealing should also be considered. One suspects that these solutions would be very similar to those of the common law. However, the resources for legal research are limited and I have not had the opportunity to find, nor have counsel pointed me to, civil law sources that might usefully be applied to the present case. I have no doubt, however, that such sources are there to be utilized.

36. In short, in discerning the content of the requirement of mutual good faith in the context of mistake and misrepresentation, whether fraudulent or innocent, the common law is sufficiently informative to be useful both because of its dependence on the concept of conscionability and the development of ensuing principles that produce reasonable solutions. Of course, these are not the only solutions, but they are

based on sound reasoning and warrant application. Accordingly, I accept the implicit submission of counsel for the respondent (which was not opposed on behalf of the applicant) that the common law principles relating to mistake and misrepresentation, should inform, if they do not determine, the legal questions here.

37. As I have said, misrepresentation does not make the contract void; it merely gives the contractor the option to avoid it. Nor, where the contract has been partly performed, can it be rescinded *ab initio* unless the parties can be returned to their original positions, which obviously cannot be done here. (I interpolate that there is no case made here that the applicant did not actually perform the services for which he was employed.) Consequently, the respondent's contention that there was no valid contract in existence upon which regulation 9.1 could operate has no merit. The argument relying on *non est factum* was not developed and, as I understand it, depended on the misrepresentation case. It is not for me to attempt to construct a case for the respondent. The shotgun approach to litigation must cease. At all events, *non est factum* does not apply here: there can be no doubt that the respondent was fully aware of the character of the contract into which it entered. Moreover, the parties will be bound to follow any condition in the contract relating to cancellation, rescission or repudiation, as discussed below.

38. It appears that the Galaxy system required a certification to be made on submitting the PHP that the candidate understands that "any false statements or the withholding of any relevant information may provide grounds for the withdrawal of any offer of appointment or, if an appointment has been accepted, for its immediate cancellation or termination". By submitting the PHP, it seems reasonable to infer that the applicant was giving the required certification. Whether this certification is actually part of the contract is a difficult question. *Prima facie*, it is a warning of possible consequences that might follow if the certification were false. Accordingly, it should be understood as a reference to the powers of the Secretary-General under the rules in respect of cancellation or termination of employment and does not provide any independent contractual basis for such cancellation or termination. On

the assumption, however, that it does form part of the contract, it must be interpreted in the context of, and consistently with, all the legal instruments which form part of the contract between the Organization and the staff member. The use of the term cancellation does not suggest that the contract will be regarded as void, especially since both it and the term "termination" clearly relate to the *appointment* and do not refer to the *contract*. In my view, there is no difference of substance, at all events, between the terms "cancellation" and "termination", a view that is confirmed by the striking circumstance that the regulations provide an elaborate scheme concerning termination but do not mention cancellation at all. Accordingly, the prerequisites for termination are those contained in regulation 9.1 and the matters as to which certification is given must be understood in the sense of those prerequisites and do not provide an independent or significantly different basis for termination. For completeness sake I mention here that, even assuming that cancellation is an available alternative, it cannot be done except by a process that recognizes the obligations of good faith and fair dealing. (I deal with this issue following a discussion of the material facts relating to the alleged misrepresentation.)

39. Alternatively (apart from the application of regulation 9.1), the reference to "immediate" may indicate that the cancellation or termination can be done before the recruit commences service, so that the cancellation is not available once the employment has actually commenced. In that event, the contract will not have been part performed and a bar to treating a contract as void will not have been created (a matter discussed later).

40. The Administration is in any event barred from arguing that there was no contract because it affirmed both its existence and currency after concluding that the applicant had made misrepresentations about his past employment and education, that is to say, when it was in full possession (from its point of view) of the relevant facts. The letter to the applicant, sent on 28 April 2008, explicitly referred to the termination of his appointment under staff regulation 9.1, thereby affirming that he was subject to the Organization's rules which, by extension, necessarily meant that

the Organization and the applicant were in a contractual relationship of which staff regulations were an integral part. The applicant was also paid termination indemnity pursuant to Annex III to the staff regulations, which further supports this point.

41. Although contract law envisages that in certain instances contracts may be voidable for misrepresentation and gives rights to rescind or cancel, this is not so in respect of every misrepresentation. Counsel's reference to *Shaw's Supermarkets* and *Devine* is, regrettably, misleading. The former case concerned a claim for worker's compensation by an employee who had misrepresented that he had no prior injuries in order to get the job. The statement of principle in the judgment is as follows (*Shaw's Supermarkets*, at 842–843, omitting references) –

> A contract induced by fraudulent misrepresentations is voidable, not void. … The rule applies in the employment context as well. … Delgiacco was Shaw's employee at the time of the injury, although his misrepresentation would have justified a rescission of the employment contract. … Generally, this issue is not analyzed on the ground that the contract was void ab initio. We thus consider whether, despite that misrepresentation, Delgiacco is entitled to receive benefits.

The court applied the following rules –

> … In order for … a misrepresentation to bar benefits, the following factors must be found: "(1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury".

The last rule is obviously immaterial. *Shaw's Supermarkets* is therefore *not* authority for any proposition concerning innocent as distinct from fraudulent misrepresentation except *a fortiori*.

42. In *Devine*, also cited by the respondent, the employee was reassigned as a Customs Entry Aide, considered a sensitive position because it involved the handling of money, checks, keys, computers, merchandise, and other sensitive matters, including intelligence. A full background investigation was thus required, including

verification of his submitted information about his background. It was established that the employee had innocently omitted to mention details of previous employment but had deliberately omitted reference to prior criminal convictions. It was accepted that, had these been known, he would not have been employed, let alone reassigned. On the other hand, he had more than adequately performed his duties with undoubted integrity. The matter went to an arbitrator who declined to dismiss the employee but imposed other disciplinary measures. The employer appealed, contending *inter alia*, that as the contract had been procured by misrepresentation, he had not been validly appointed and his contract was a nullity. Accordingly, the employee was not entitled to the protections otherwise applying to adverse decisions under the relevant regulations, including in particular the right to a review of his dismissal. The United States Court of Appeals rejected this argument. Certainly, it held that removal of an employee whose appointment was obtained through fraud or misrepresentation was lawful, but it clearly meant *wilful* and not innocent material misrepresentation. The Court categorically rejected as without merit the submission that an appointment obtained through material misrepresentation is void or voidable *as such*, without undertaking the same procedural safeguards and review as any other employee subject to an adverse action. The Court based its conclusion, in part, on the existence of a procedure in the regulations that dealt specifically with removal for suitability disqualifications, including intentional false statements, and the absence of any mention in these regulations of the "voiding" of an invalid appointment (see *Devine*, 724 F.2d 1558 at 15). This case can be regarded, therefore, as providing by analogy useful insight where there is a structure in place for dealing with removal for suitability disqualifications such as is the case here.

43. It is obvious, though perhaps worth stating, that a misrepresentation by concealment is nonetheless a misrepresentation and may imply a representation that the concealed fact does not exist. Implying positives from a negative is, however, fraught with both logical and practical difficulties.

The misrepresentations relied on in this case

44. The respondent has submitted generally that the facts relied on to terminate were accurate. Having regard to the focus on the issue of formal legality of the decisions to place the applicant on special leave and terminate his contract, it is not necessary to consider the actual reliability of the investigation report but, in light of this submission, some observations – albeit tentative – are necessary. As discussed below, these observations militate against the report being accepted as reliable in relation to controversial facts and strongly suggest that it should not have been so regarded by the decision-maker in this case, at least without independently evaluating this material. The only areas that need to be mentioned are those that were apparently used to justify the termination. Although the letter of termination mentions that DSS "was misled into selecting" the applicant because it was unaware of the reasons for his leaving the posts he held prior to 2001, it does not suggest that this was the fault of the applicant or that he had intentionally concealed what he should have known were material facts (though this was the inference drawn by the investigators) or that this omission was a material factor in his termination.

45. Here, the two relevant alleged misrepresentations relied on for the termination concern the applicant's education and non-disclosure of his prior employment with the ICTY. In respect of the first, it is not possible to accept that it was a material factor in his selection and no reasonable decision-maker could have supposed otherwise. Nor is there any worthwhile evidence that any reliance was placed upon this qualification as a university degree as distinct from being a lesser tertiary qualification. It is fair to observe also that the finding of the investigation that the applicant's description of this qualification as a degree was dishonest is not explained by any reasonable process of reasoning; rather, the facts strongly support the opposite conclusion. Amongst other things, the applicant informed the investigators that the phrase "Superior Police Degree" was translated into English by the Ministry of Foreign Affairs, information which the investigators, it appears, did not bother to check. This was also the description used by an official of the applicant's home

country's federal police in a *curriculum vitae* of the applicant that was supplied to OHRM. (The suggestion made by the investigators as to the reliability of this document, for reasons not presently relevant, is of little cogency. It suffices to say that it gives rise to troubling doubts about objectivity.) The investigators relied, for determining whether the qualification was a university degree or equivalent, upon a letter containing hearsay information about the issue which required, but did not receive, further clarification. Furthermore, this letter was itself ambiguous and required further elucidation. I note that no translation of it forms part of the papers attached to the report. Whilst the letter justified questioning the applicant's implicit claim that his "diploma" was the equivalent of a degree, considered alone, it provided an insufficient evidentiary basis for the conclusion that the applicant's claim was unreasonable, still less that it was dishonest. That this appears to have been a matter of considerable importance in the mind of the decision-maker (whomever it was) is a problematic feature of the case. In my opinion, the unconvincing material dealing with this issue and the unpersuasive and tendentious reasoning concerning it also calls into question the competence of other inferential findings. This would have been obvious to any genuinely objective decision-maker who conscientiously evaluated, rather than simply rubber-stamped, the investigation report.

46. So far as the second alleged misrepresentation (the non-disclosure of employment with ICTY) is concerned, the relevant questions in the PHP appear to be question 15 ("If you have previously submitted an application for employment and/or undergone any tests with the United Nations, indicate when"), to which the applicant gave no answer, and question 26 ("Starting with your present post, list in reverse order every employment you have had"), in respect of which he did not mention his time with ICTY. He listed only employment from September 2001 through to the "present". It was of course true that the applicant had not been employed at the ICTY during this period. That service occurred from September 1995 to August 1997. His application was silent as to his employment prior to September 2001. Since he completed his course at the Police Academy in 1993 at the age of 31 years, it would have been obvious (as we say in Australia) to blind Freddy sitting outside the Wiluna

pub, that his list of employments was truncated. In the circumstances, the suggestion that the PHP implied that he had not been previously employed by the United Nations is without foundation and I do not see how any decision-maker could reasonably have so concluded. Indeed, at a later point but before appointment, the Human Resources Officer was given, as I have mentioned above, a complete *curriculum vitae* from the applicant's home country's federal police on 19 October 2006, which referred to the applicant's secondment to the ICTY as an investigator from 1 September 1995 to 30 November 1997. It follows that, even if there had been a misrepresentation, the contract was not affected by it.

47. As to the reasons for the applicant's contracts with ICTY and OSCE not being renewed, it is sufficient to say that neither situation was clear and that there are a number of inconsistencies concerning the evidence gathered by the investigators in both respects, but inadequately analysed, as well as failures to make apparently sensible enquiries. However, these matters do not involve material misrepresentations. Whether they amount to anterior facts sufficiently established is another question which I do not need to discuss having regard to my conclusions on the unlawfulness upon other grounds of the relevant administrative decisions. In fairness to the applicant, however, I should indicate that there are good grounds for questioning the cogency of the investigation report in relation to these matters.

48. It will have been noted that the respondent alleged, apparently in the alternative, that the applicant's misrepresentations were fraudulent. However, the letter of termination is not cast in terms of fraud or dishonesty, no doubt deliberately. The respondent does not, in the course of extensive submissions, identify with precision any alleged dishonesty on the applicant's part, rather choosing ambiguous language that might carry this imputation but might not. This approach to allegations of fraud is unacceptable. The submission alleges that the applicant made a representation of fact to the Organization which was not true to his knowledge but does not identify this representation nor the basis for asserting its untruthfulness. It is submitted that the letter of termination stated that "the applicant misrepresented his

employment history with the United Nations, thereby disguising the fact that he was reprimanded at the ICTY and the reasons for non-renewal of his appointment", implying, though ambigiously, that this disguising was intentional. This is a mischaracterization of the letter of termination which, in fact, is neither cast in this language nor implies dishonesty.

49. Quite apart from inappropriate imprecision, a fundamental difficulty facing the respondent's allegations of fraud is that they depend on conclusions in the investigation report that was not tendered for the purpose of proving either the truth of its contents or the correctness of the investigators' opinions. There is no evidence of fraud presently before me. Even if the notification of termination contained an allegation of fraud, implicit in the reference to the less than perfect integrity of the applicant, this cannot be relied on as evidence justifying the submission. As a matter of legal principle, fraudulent misrepresentations as to material facts will almost invariably render the contract voidable but not void, especially where (as here) the contract has been partly performed in accordance with its terms and the parties cannot be returned to their original positions. In addition, for the reasons I give below, the making of such misrepresentations does not permit the respondent to depart from the implicit conditions of the contract embodied in the instruments of the Organization concerning termination or dismissal. The allegation that the applicant deliberately concealed matters that he knew to be relevant for the purpose of obtaining appointment is not one that can be made, let alone considered, on the material presently before me. Moreover, since this – and any other allegations suggesting dishonesty – must have been or needed to be dealt with pursuant to chapter X of the Staff Rules, I am very doubtful that I have jurisdiction to determine whether they occurred in the absence of that procedure having first been followed.

The effect of staff regulation 9.1

50. It should be noted, at the outset, that the respondent never purported to act under any other authority except that conferred by regulation 9.1, which was

explicitly relied on in the letter of termination and which provided the basis for post termination benefits. The possibility of an alternative method of ending the applicant's employment was never articulated at any point during the consideration of the applicant's request for administrative review or the pleadings in the Joint Appeals Board or even in the Tribunal until the issue of the delegated authority of the ASG/OHRM or the OIC/OHRM to terminate a contract was raised during a directions hearing preparatory to trial. It was eventually conceded by counsel for the respondent that the termination under regulation 9.1 was unauthorised. Only then were the contentions proffered, first that the contract was void and the ASG or OIC/OHRM merely recognized and declared this to be so and, secondly, if the contract was not void, the ASG or OIC/OHRM brought it to an end as a contract rendered voidable by misrepresentation. One can safely say that no person who made any decision in relation to the applicant's employment, let alone the ASG (if, indeed, the ASG made any decision, which is almost certainly not the case) or the OIC/OHRM, was conscious of acting in the way proposed by counsel years after the event; to the contrary it is obvious that everyone thought they were acting pursuant to regulation 9.1. An argument that is based upon a fiction, though capable of articulation, is unlikely to be persuasive.

51. The crucial legal question concerns whether the proper construction of the contract, of which regulation 9.1 was part, provides that it can be brought to an end, (as argued on behalf of the respondent) under the general law by means omitted but left available by the rules, regulations and administrative issuances of the Organization. The two grounds relied on by the respondent for ending the contract in this way are the specified alleged misrepresentations and anterior facts. The latter may be immediately disposed of. Regulation 9.1 specifically provides for termination in the event of the discovery of "anterior facts relevant to … [the staff member's] suitability … that, if they had been known at the time of … appointment, should, under the standards established in the Charter, have precluded … appointment". This provision undoubtedly covers the field of subsequently discovered material facts and, as a matter of necessary implication, excludes the

availability of any other mode of ending an employment contract upon this basis. (Including, of course, material mistakes of fact as a ground of voidability, since inevitably this would amount to a relevant anterior fact – only mistakes that are fundamental to the contract will make it voidable at general law.) The remaining question is whether the possibility of ending the contract for misrepresentation otherwise than under regulation 9.1 remains open. To my mind, this question is also easily disposed of. As provided in staff rule 109.1(b), termination within the meaning of the Staff Regulations covers *every* separation from service initiated by the Secretary-General, other than retirement and summary dismissal for serious misconduct. Separation from service is an expression of ordinary English and plainly comprehends the ending of an employment contract without regard to means or method. The generality of the notion is reinforced by the perceived need to exclude separation by retirement and summary dismissal. It follows, therefore, that the only mode by which separation can be effected or, in other words, the contract of employment brought to an end, is pursuant to regulation 9.1 or, of course, pursuant to disciplinary procedures, which are also part of the instrumental conditions of the contract.

52. This conclusion is reinforced by noting that every misrepresentation capable of justifying cancellation of the contract would necessarily fall within the grounds for termination specified in regulation 9.1. Of course, a fraudulent misrepresentation, that is, one that was made dishonestly – whether with the intention of procuring employment or not – would be conduct that "does not meet the highest standards of integrity required by required by Article 101, paragraph 3, of the Charter" and, almost certainly, misconduct justifying (and, as I explain below, requiring) disciplinary proceedings and, potentially, summary dismissal. I return to the significance of this potential overlap in due course, but it is sufficient to note for present purposes that the allegations made against the applicant in the letter of termination, if true, fall fairly and squarely within regulation 9.1.

53. The respondent contends that the UN Administrative Tribunal has found that it is not essential for the Secretary-General to expressly invoke regulation 9.1 for a termination to be effective under that provision and that, by extension in the present case, the Secretary-General was entitled to end the contract on grounds of misrepresentation otherwise than under regulation 9.1, even though no notice was given that this was the ground for doing so, citing the judgment in *Moore* (1999) UNAT 923. In that case, the applicant submitted a personal history form that the Administrative Tribunal found was intentionally dishonest. The Secretary-General did not in terms invoke staff regulation 9.1(b) to terminate the staff member's employment, but instead declared the contract invalid because of material omission and misrepresentation. The Administrative Tribunal held that, despite the language used in the declaration of invalidity, in fact the contract was ended by virtue of regulation 9.1 and that it applied "whether expressly invoked or not". The judgment does not suggest that a material misrepresentation permits the Organization to act on the basis that the contract is void or may be cancelled otherwise than by virtue of regulation 9.1 (or, where appropriate, as a disciplinary measure). It is, however, authority for the proposition that ending a contract in reliance on anterior facts, whether the subject of misrepresentation or not, must be dealt with in accordance with and pursuant to regulation 9.1.

54. Accordingly (and even apart from *Moore*), there is no merit in the submission that the regulations and rules of the Organization leave open the possibility of ending a contract – whether this is termed cancellation, repudiation, rescission or termination – otherwise than under regulation 9.1 or by dismissal for misconduct pursuant to disciplinary proceedings. For completeness, I mention again that the question whether a contract exists *at all* because of the *non est factum* rule does not arise in the present case, given that there was no question as to the fundamental character of the contract. The contract with the applicant was not only, in fact terminated under regulation 9.1, but there was no other legally available mode of bringing it to an end.

The test for termination

55. It is worth mentioning, perhaps, that no ordinary human being could meet the "highest standards of integrity" or the "highest standards of efficiency", let alone both of these requirements: saints are usually not all that practical and practically effective people are rarely saints. Although it is understandable that such expressions are used because of their origin in the Charter, they are out of place in a provision dealing with termination, since they do not provide any guidance, either managerial or legal, for the exercise of the relevant discretion. There are other explanations of standards elsewhere in the instrumental material of the Organization – for example that dealing with staff evaluation – which could usefully be referenced here. The vice is that everyone knows that the highest standards of integrity and efficiency are neither possessed nor actually applied. The objection to the posited standard is that it does not mean what it says. In the real world there simply cannot be an absolute standard. Moreover, it is manifest that not every failure to meet the highest standards could justify termination. The failure must be a substantial one that significantly affects the staff member's effectiveness as an employee. The basic problem with the use of terms with little or no discernable and applicable content is that they yield no real information either to the decision-maker or, just as important, to the staff member as to what material facts can justify termination and thus they permit – indeed, render inevitable – arbitrary and inconsistent decision-making,

56. As a fundamental rule of drafting either contracts or legal instruments, language should not be used that does not, let alone cannot, mean what it says, especially where it defines legal rights and obligations. Of course, general language cannot be completely avoided and no bright line can be usefully be specified when dealing with many matters, including termination, not only because of the infinite variety of potential circumstances but the different standards that, for example, would apply to a general service clerk and an Under-Secretary-General. But this does not justify language that it is impossible to apply meaningfully. To put it colloquially, it is not enough for the decision-maker to say, "I don't understand what is actually

required by the obligation to act in conformity with the highest standards of efficiency and integrity but I will recognize it when I see it".

57. The consequence is that the only practical approach is to say that, whatever the highest standards of integrity or efficiency require, the staff member's actual conduct meant that he did not or was unable effectively to perform his functions, which includes an appropriate standard of personal honesty. This is not to attempt to draft a rule but, rather, to demonstrate how lacking in utility is the present standard. There should be an explicit rule (rather than one discoverable from legal rulings) and it should point both decision-maker and staff member towards the actually relevant considerations and describe a meaningful real-world test, albeit one that might lead to a range of different but nevertheless reasonable outcomes. It is obviously unsatisfactory that the test actually to be applied is suppositious: the point of a written rule is that supposition and implication are, to the greatest possible extent, kept to a minimum.

58. At the same time, the letter of termination did at least assert, in effect, that the alleged failures meant that the applicant was unsuited for appointment because the position required the incumbent to "possess the highest degree of personal integrity and competence" in light of its sensitive character. It did not, however, relate the alleged shortcomings to the requirements of the position in any meaningful fashion, which would have required at least some details since the information given was scarcely self-evident and required knowledge of the investigation report to appreciate. In particular, there was no information as to how the matters identified reflected on the applicant's integrity, since no dishonesty was alleged or implied. Regrettably, the response to the applicant's request for administrative review gave no further useful information. Moreover, mere reference to the investigation report was insufficient, since not only was its content not provided to the applicant, but it is still not known how much of it was accepted and how much was not. One is left with the surmise that the identified facts – as unspecific as they all were in one way or another – were extracted or inferred from the report.

The authority to terminate

59. Counsel for the respondent conceded that authority to terminate the applicant's contract resided solely in the Secretary-General and no other official and that, in fact, the Secretary-General had not made the decision. The letter of termination, however, categorically stated that this was the decision of the Secretary-General. This was completely untrue and, what is more, must have been either known to the author to be untrue or was made recklessly without regard to its truthfulness or otherwise. Moreover, since the Secretary-General had not actually made the decision, the attribution to him of a reason was a fabrication, necessarily conscious. Furthermore, since a decision by the Secretary-General was essential to the validity of the termination, it was misleading as to a fundamental matter going to the propriety of the termination itself. In a case where the termination was based upon alleged misrepresentations made by the staff member this was, to say the least, ironic. There was no way that the applicant could have known that the attribution of the decision to the Secretary-General was false and, hence, that his termination was illegal. Such was the apparent incompetence of the administrative review that the identity of the decision-maker and his or her authority to make the decision was not ascertained, although it was fundamental to its legality.

60. The falsity was permitted to go to the Joint Appeals Board and to the Tribunal, thus affecting and potentially perverting the administration of justice itself in respect of a matter going to the heart of the central issue in the case, namely the unlawfulness of the termination, a fact known to at least one key person in OHRM but kept from the applicant. Had it not been for the percipience of counsel for the applicant, the truth would almost certainly never have been disclosed. This situation cannot be characterized as otherwise than disgraceful. Proper research by counsel for the respondent in preparation of the case for hearing should have uncovered the facts but it was not until the question was raised by counsel for the applicant in the Tribunal and an answer required by the Tribunal that an enquiry was made and the truth – easily ascertainable – eventually disclosed.

61. In my short time on the Tribunal, I have seen many communications referring to decisions as made by the Secretary-General which, I now understand, were not made by him at all. This is completely unacceptable. Firstly, all communications, especially those conveying decisions must be truthful; secondly, the staff member is entitled to know who is actually responsible for the decision in question, not only as a matter of courtesy, but because he or she needs to know whether the decision was legally authorised. If the decision is made pursuant to a delegation, the decision-maker must state that it is so made and identify the person who gave the delegation. A decision that is made by a delegate is not made by the delegator and it is inaccurate and misleading to say that it is. A decision that is made by a person authorised by the staff rules and regulations who is not the Secretary-General is not made by the Secretary-General; a decision made by a person in the course of his or her duties who is not the Secretary-General is not made by the Secretary-General. This is both simple and elementary. I am unable to conceive of arguments that could justify the untruthful attribution to the Secretary-General (or any other official) of decisions they did not make. Such an attribution is calculated to avoid formal identification of the true decision-maker and gives the appearance of avoiding personal responsibility and accountability. It is not to the point to argue, if the argument is sought to be made, that this is the practice. Institutional misrepresentation is even more objectionable than occasional lapses.

62. It will have been observed that counsel for the respondent implicitly submitted that the decision to cancel the applicant's contract was made by the ASG/OHRM. I find myself regrettably unable to rely upon an unsubstantiated statement of this kind. Indeed, it is almost certainly not true, as was conceded by counsel during the hearing. The notification was signed by the OIC/OHRM and did not mention the ASG. At all events, since it is conceded that the decision was not made by the Secretary-General, the possibility that it might have been made by the ASG/OHRM is immaterial.

The relationship between misconduct proceedings and termination

63. The grounds in regulation 9.1 authorising the Secretary-General to terminate a contract are, in summary:

i. the necessities of the service require abolition of the post or reduction of the staff;

ii. the services of the individual concerned prove unsatisfactory;

iii. incapacity by ill-health for further service;

iv. if the conduct of the staff member does not meet the highest standards of integrity;

v. if facts anterior to appointment relevant to suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment; or

vi. it is in the interest of the good administration of the Organization and in accordance with the standards of the Charter.

64. The grounds provided in former staff rule 110.1 for taking disciplinary proceedings against a staff member are more simply and generally stated, namely the failure to comply with the obligations under the legal instruments of the United Nations or to observe the standards of conduct expected of an international civil servant. The measures that may be taken under this rule range from written censure by the Secretary-General to a separation from service, with or without notice or compensation, and summary dismissal. It is obvious from the range of disciplinary measures that may be imposed that a gradation of the extent of departure from the relevant standards is implied, with only the most serious justifying separation without notice or compensation or summary dismissal. It is clear, furthermore, that a mere failure to comply with the highest standards of efficiency could not possibly justify

disciplinary measures; it would be virtually impossible to find any individual who consistently complied with such standards. Ordinary human failings, within a reasonable range, would only very rarely justify disciplinary proceedings unless they involved a significant shortcoming in personal integrity. It may therefore be said with confidence that dismissal as a disciplinary measure could only be justified in cases involving substantial moral turpitude, whether by act or omission. No doubt because of the impact of a finding of significant impropriety, and the nature of the potential outcome, specific safeguards are provided to ensure a fair and objective consideration of any allegation of misconduct, capable of justifying a disciplinary measure. Perhaps the most significant aspect of these procedures at the time was the interposition of the Joint Disciplinary Committee before a disciplinary measure could have been imposed and, in respect of summary dismissal, following a request by the staff member.

65. There is a substantial degree of overlap between conduct justifying dismissal (whether summary or not) on the one hand and that justifying termination on the other. Conduct in the former category would necessarily demonstrate that the staff member's services were unsatisfactory or did not meet the highest standards of integrity or contrary to good administration in accordance with the Charter. Of course any conduct justifying termination (apart from arising from post abolition for staff reduction) would need to be of such significance as to justify that course and enliven the discretion of the Secretary-General, which must be exercised that reasonably and in good faith. The question is whether, where conduct falls into both categories, separation can only be initiated following the procedures outlined in chapter X of the staff rules relating to disciplinary measures or whether the Secretary-General can choose, instead, simply to follow the procedures prescribed in regulation 9.1. It seems to me that two approaches to this question are reasonably open. The first approach points to the manifest purpose of chapter X to safeguard staff members, whose reputations and (as here relevant) employment is at risk, by prescribing an ordered process of which the basic elements are, first, notification of the allegations and the material upon which it is based, secondly, the opportunity to respond and

provide further evidence and, thirdly, the interposition of an objective and relatively independent third party, in the form of the Joint Disciplinary Committee, which is able to examine the evidence and any additional matters brought to its attention for the purpose of advising the Secretary-General on an appropriate outcome, which advice is not required to be followed but which must certainly be seriously considered before the decision is taken.

66. It might be reasonably thought that the construction of such an elaborate scheme for dealing with misconduct justifying a disciplinary measure under chapter X of the Staff Rules (for ease of reference described simply as "misconduct") implies that all misconduct (necessarily where it might justify dismissal), must go through this process before it can be relied on for the purpose of making an decision adverse to a staff member, especially that which involves separation from service.

67. The second approach is that separation by way of termination under regulation 9.1 does not entail the same consequences as dismissal under chapter X, since the staff member is given substantial benefit where this provision is invoked and, accordingly, there is no need to provide the staff member with the chapter X safeguards even where the conduct relied on to justify a termination also amounts to misconduct. So far as reputation is concerned, the staff member is entitled to place a response to any allegations on his file: see ST/AI/292.

68. I should deal with the intermediate position where, although as it happened misconduct has occurred, the conduct justifying termination is characterised in terms which do not imply the moral turpitude involved in misconduct. It seems to me that, where this can be done, and the more limited conduct relied on does not of itself involve misconduct, but justifies termination on a ground specified in regulation 9.1, no question of conflict with chapter X arises, and it is not necessary to comply with the procedures it prescribes. To put it another way, it is only where the conduct relied on to terminate under regulation 9.1 is also misconduct that the question whether it is necessary to proceed under chapter X arises.

69. This question was considered by the UN Administrative Tribunal in *Sam-Thambiah* (2005) UNAT 1214 where the staff member was terminated under regulation 9.1 for conduct reflecting to some extent upon his integrity, but in respect of which misconduct proceedings were not undertaken. The Administrative Tribunal stated –

> The Secretary General of ISA chose not to pursue disciplinary action against the Applicant in this case. He chose to have the matters alleged against the Applicant investigated and dealt with as performance issues rather than as allegations of misconduct, thus obviating the need to investigate or seek to prove the mental element or the wilfulness of the actions which would ordinarily be relevant had he chosen to seek to establish misconduct. The Tribunal considers that this decision was legitimate in the circumstances, having regard to the nature of the issues raised. This would not necessarily be so had they been of different character, as some activities can only be viewed as allegations of dishonesty, and in such instances, disciplinary procedures must be involved.

70. As I have already pointed out, misconduct that is capable of justifying dismissal is the subject of special rules designed to ensure orderly investigation and a fair process, including the utilization of the JDC. Proceeding from general rules of construction, the applicable rule in these circumstances is that which is widely known in its Latin expression: *generalia specialibus non derogant*; in English, the general does not derogate from the particular. Despite the Latin, it really is a rule of common sense. It seems to me, with respect, that the approach stated by the Administrative Tribunal in *Sam-Thambiah* is correct. Accordingly, misconduct cannot be relied on to terminate under regulation 9.1. Wrongful conduct, however, that occurred at a time prior to employment with the Organization cannot be the subject of proceedings under chapter X and thus, in principle, could justify termination as a relevant anterior fact under regulation 9.1, since chapter X does not apply to them. On the other hand, where it is alleged, for example, that the staff member had *dishonestly* failed to disclose the prior misconduct or dishonestly attempted to conceal it, proceedings under that instrument could be taken and the dishonest nondisclosure could not be used as grounds of termination under regulation 9.1.

71. The notification of termination described the conduct relied on by the decision-maker to terminate the applicant's employment. Although susceptible of some ambiguity, I do not think those matters amounted to misconduct. The reference to the lack of integrity is, however, problematic since it suggests misconduct. The mere fact that the investigation report contained allegations of misconduct is immaterial. Since, in the present circumstances, I do not actually need to decide whether the termination was invalid for failing to comply first with chapter X and arguments could be put either way as to whether misconduct was in fact a ground for termination, I do not intend to decide the point.

72. Before concluding this aspect of the case, I should deal with applicant's complaint concerning the failure to complete the disciplinary process as prescribed in ST/AI/371. It appears to be undisputed that the investigation of the applicant was undertaken pursuant to sec 2 of this instrument. It is not known if the steps prescribed by secs 3 and 5 have actually been undertaken although it is likely, I think, that OHRM (perhaps the ASG) was given the investigation report under sec 3. There can be no doubt that, in light of the mandatory language of sec 5, if the investigation indicated that the report of misconduct was well founded (*vide* sec 3), the ASG was obliged to "decide whether the matter should be pursued". Making such a decision is mandatory and not discretionary. "Pursued" in this section is a reference to the procedure prescribed in secs 6 to 9 of the instrument. It is indisputable that that procedure was not undertaken and it must therefore be inferred that the ASG/OHRM made a decision (as he or she was obliged to do, one way or another) that the matter should not be pursued. Although it is not specifically so provided, the requirements of good faith and fair dealing required the ASG, in this event, to inform the staff member of his or her decision. The other consequence of the decision not to pursue the matter is that it must be regarded as closed and the disciplinary process completed. It cannot be resurrected in these proceedings. The decision not to proceed with the disciplinary process supports the conclusion that the termination here could not be legally justified on the grounds amounting to misconduct.

Due process in preliminary investigation

73. The applicant submitted that the investigation violated his due process rights, which should have an impact on the amount of compensation to be awarded to the applicant. The respondent's position is that procedural rights under ST/AI/371 attach only after the staff member is charged with misconduct and that during the preliminary investigation the staff member is not entitled to be made aware of the allegations, the scope of the investigation, and does not have access to the documentary evidence and witnesses.

74. I am far from persuaded that the respondent's submissions with respect to the rights afforded to staff during preliminary investigations are correct. Although ST/AI/371 discusses what must be afforded to staff after they have been charged with misconduct (sec 6) and it does not prescribe any course of action in this respect at the preliminary investigation stage, it does not follow that the usual requirements of good faith and fair dealing do not apply. However, it has not been submitted to me by the parties on what procedural basis DSS conducts its investigations.

75. The respondent's interpretation of due process in preliminary investigations appears to run counter to several pronouncements of the Administrative Tribunal, including those issued prior to the investigation in this case (*Sokoloff* (2005) UNAT 1246; *Singhal* (2005) UNAT 1260; UNAT 1261 (2005); UNAT 1262 (2005); UNAT 1267 (2005); *Tissot* (2009) UNAT 1447). (Neither counsel included these cases in their submissions and I regret that I have to remind them that it is their duty to bring relevant authority – including authority that contradicts their position – to the Tribunal's attention.)

76. In *Sokoloff*, a staff member was separated from service as a result of an investigation of allegations of sexual harassment. The Administrative Tribunal found that there was an "apparent contradiction" between provisions of General Assembly resolution 48/218B (requiring "due process for all parties concerned and fairness during any investigation"), the 2005 OIOS Manual of Investigation Practices and

Policies (which stated that staff members "cannot refuse to answer and are not entitled to the assistance of counsel during the … fact finding exercise"), and UNDP/ADM/97/17 (which explained specific procedural requirements for UNDP investigations). The Tribunal held that, as soon as a person is identified, or reasonably concludes that he or she has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he or she has the right to invoke due process with "everything" that this guarantees, including notification of allegations in writing; access to all documentary evidence; and access to counsel –

> The Tribunal considers that the Applicant was probably identified as a possible wrongdoer once the "Note for the file" was filed, but, in any event, was certainly so considered upon the release of the Addendum to the investigation report. It finds, therefore, that from that point on he was protected by the provisions of UNDP/ADM/97/17, which states that investigations are administrative — and thus no due process is given — only when no specific allegation of misconduct is reported or individual staff member identified. In consequence, in accordance with paragraph 2.2 of that circular, as soon as the Applicant was identified as a possible wrongdoer, he should have been accorded due process, which includes being notified of the allegations in writing, provided with all documentary evidence, and permitted to have counsel. …
>
> V. In conclusion, the Tribunal is of the opinion that the assurances of due process and fairness, as outlined by the General Assembly and further developed in the rules of UNDP, mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees. Moreover, the Tribunal finds that there is a general principle of law according to which, in modern times, it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests, *sine processu*. …

77. Although *Sokoloff* concerned preliminary investigation conducted under UNDP procedures, it cannot be the case – nor does the language of *Sokoloff* indicate that this was the intention of the Administrative Tribunal – that the judgment was limited to UNDP staff and that staff members from other parts of the UN would be given lesser procedural protections. This is supported by the subsequent jurisprudence which relied on *Sokoloff* with respect to cases outside UNDP (see, e.g.

UNAT 1261 (2005) and UNAT 1262 (2005)). I also note *Tissot* (2009) UNAT 1447, which involved a finding that a MONUC staff member had engaged in inappropriate behaviour. The Administration decided not to pursue it as a disciplinary case, but instead reprimanded the applicant. Discussing the procedural rights afforded to the applicant, the Administrative Tribunal stated –

> VIII. The Tribunal does not accept the Respondent's claim that there should be a distinction between the limited due process rights applicable during preliminary investigations regarding possible misconduct and those applicable after a staff member has been charged with misconduct. In Judgment No. 1154, *Hussain* (2003), the Tribunal stated:
>
> > "It is a well established principle of law, part of the wider principle of due process, that whoever is accused of any wrongdoing must be given a fair opportunity to defend him/herself within a proper procedure."
>
> IX. Where a failure of due process in the preliminary investigations has an "inevitable and direct impact on the decision in the following stages" (Judgment No. 1246 (2005)) this may invalidate the decision of the Respondent, and compensation may be awarded for any injury or harm to the Applicant. The Tribunal finds that in this case, the Applicant was denied due process in not being allowed access to the documents containing the allegations made against him. …

78. It seems to me that these decisions of the Administrative Tribunal, with respect, are correct in principle and should be followed. For myself, however, I would respectfully prefer to base the staff member's right to "due process" and the corresponding obligation of the Administration squarely and explicitly upon the contractual requirements of mutual good faith and fair dealing. It might also be noted that the requirement to afford "due process" to a staff member in this context has now become a reasonable expectation forming part of his contractual conditions. Yet another approach is also available that looks to the requirement of rational decision-making that the decision-maker takes all reasonable steps to obtain the relevant facts. When allegations are made against a staff member, it is a necessary element of due administration that any resulting decision must be based upon an adequate inquiry. This necessarily involves seeking information from the staff member both as to the

allegations and, ultimately, the findings or recommendations affecting him or her. Not to do so is unreasonably to fail to take a necessary step to ensure that any decision will be appropriately informed. This procedure reflects in its essential characteristics that set out in *Sokoloff* and subsequent judgments. That these disparate lines of well accepted legal reasoning result in the same conclusion is good reason for accepting the conclusion as valid.

79. Accordingly, I am not inclined at this stage to regard the respondent's manifestly incomplete submission – which does not deal with any of these possible approaches, let alone mention any notion of fairness – as at all persuasive with respect to the applicant's rights. I also understand from the respondent's submissions that he may argue in the alternative that the applicant was informed of the allegations against him and that he was informed that he had the right to be accompanied by a staff representative and, in fact, was accompanied by a Panel of Counsel member at one of the interviews with the investigators. But whether this is sufficient is, of course, another question. For the present, conclusions should not be drawn without admissible evidence and proper submissions on the point.

Proper procedures prior to termination

80. Although regulation 9.1 does not prescribe any procedures that are required to be undertaken before making a decision to terminate a staff member's employment, the contractual obligations of good faith and fair dealing apply to such a decision, all the more so because of the serious character of such a decision. What these obligations actually comprise in practical terms will depend upon the circumstances of each case and no detailed description can be usefully provided. Of course, the process must be a rational one, that is to say it must involve the decision-maker informing him or herself of the relevant facts and personally exercising such discretionary judgment as has been reposed in him or her. Where the judgment is to be personally exercised, it follows that it cannot be delegated. Thus, in this case, it was essential to critically examine the report to ensure the investigation was

undertaken in a reasonable way, that the primary facts were ascertained competently, and that the inferences contained in the report were justified. To have done otherwise would have been to improperly delegate to the investigators the primary responsibility of the decision-maker.

81. Good faith and fair dealing required that the applicant was given an opportunity to respond to any adverse findings of fact and any adverse recommendations before the decision to terminate was made. Common sense is enough to demonstrate that this could not sensibly be done without giving him the report itself or access to its key elements. If there were any real issues about confidentiality, of course they would need to be addressed, and it may be that a redacted copy could have been provided to him for his response. It seems clear that the decision-maker, whomever it was, decided not to provide the report to the applicant or to provide meaningful particulars. Aside from asserting that this was the practice of the Organization, counsel for the respondent has not attempted to bring to my attention a process of reasoning which justified following such a practice in the present case. Nor has he sought to explain why the obligations of good faith and fair dealing did not require provision of this material to the applicant. Repetition of the mantra, seen frequently in relation to issues of this kind, that a staff member has no right to the report and it is the practice of the Organization not to provide it, is not a substitute for rational argument. Since decision-making, if it is to be legitimate, must be at least rational, the inference that the decision-maker here simply applied the mantra which I have mentioned seems to be justified and, to my mind, brings the process that was undertaken into serious question.

82. In this case, adverse findings by the decision-maker in large part depended upon facts which were certainly capable of dispute, witnesses many of whom could not be regarded as completely objective, occasionally relying on hearsay and sometimes even hearsay upon hearsay not verified by the investigators, and whose opinions were reported as facts. The report is replete with bland generalisations and tendentious statements, which frequently beg the question. It is at least fairly

arguable that no sensible or reasonable investigator, let alone decision-maker, would draw important conclusions upon this material without having available and considering the responses of the applicant, not only as to the issues but also as to the character, position and possible interests of the witnesses relied on and the witnesses, if any, identified by the applicant. This is especially true of the assessments of the applicant's credibility on matters in which his account differed significantly from those of persons interviewed by the investigators. In all candour, I should observe that my admittedly tentative examination of the investigation report gives rise to questions about the adequacy of analysis of these contradictions and, perhaps more damaging, the objectivity of the investigators. As it is not necessary for present purposes that I come to any final conclusions about these factual matters, I do not do so. I mention this simply as a response to what seems to me to be the dubious submission of counsel for the respondent to the effect that the report was adequate and appropriate. Rather, I am concerned about the evaluation process which was undertaken by the unknown person who made the decision to terminate the applicant's contract. No evidence has been tendered concerning this process which, in my view, could not have been properly done in the absence of some written record, in light of the extensive material in the report, the number of significant matters being investigated and reported on and the nature and number of the recommendations. A mere read-through would plainly be inadequate.

Placing the applicant on special leave

83. Former staff rule 105.2(a) provided that "[i]n exceptional cases, the Secretary-General may, at his her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization". The letter of the OIC/OHRM of 14 September 2007 specifically stated that the investigation was initiated pursuant to sec to of ST/AI/371 and that "the Secretary-General has decided … it would be in the best interests of the Organization that [the applicant] be placed on special leave with pay pursuant to staff rule 105.2(a) pending investigation …".

The Secretary-General again, had not made the decision. It follows that the reason attributed to him was a fabrication.

84. Counsel for the respondent contended that such a decision was made by the OIC/OHRM "acting in the capacity of the ASG". I regret that, without evidence of this fact, this statement from the bar table cannot be accepted. Aside from anything else, the letter signed by OIC/OHRM unqualifiedly attributes the decision to someone else. There are times when assurances can be accepted and times when it would be naïve to do so. This is a case in the latter class. There is no evidence of delegation of authority to the OIC/OHRM and, again, I will not accept counsel's statement in lieu of evidence.

85. Another fundamental obstacle to the respondent's contention is that, at all events, the ASG does not have authority to place a staff member on special leave pending the outcome of the preliminary investigation. The term "special leave" is used in rule 105.2(a) to describe two circumstances: the first "at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the Secretary-General may prescribe"; and the second, special leave at the instance of the Secretary-General. It is clear that the first class has two elements, namely, the request of the staff member and the specified purpose. Here, the applicant did not request leave; nor was leave given for one of the specified purposes. The delegation provided by Annex II of ST/AI/234/Rev.1 is limited to the grant of special leave of this kind. Accordingly, the ASG had no authority to place the applicant on special leave pending the outcome of the investigation. Regrettably, the submission of counsel did not even condescend to a discussion of the rule or the delegation. His submission is without merit and must be rejected.

86. The notice of 14 September 2007 purported to place the applicant on special leave for three months or until completion of the investigation, whichever was the earlier. On 7 December 2007 the investigation not having been completed, the placement on special leave was purportedly continued. Again, the decision was

untruthfully attributed to the Secretary-General, again the reason was fabricated. This time the author of the notification was the Director, Division for Operational Development of OHRM. This action was again unauthorised and, again, there is no evidence as to the identity of the decision-maker. The process was repeated on 10 March 2008. This time the notification was sent on behalf of the OIC, Division for Operational Development, OHRM by an officer of unidentified rank but presumably a subordinate. The suggestion of a decision by the ASG, already thin, is attenuated to invisibility. To overcome these problems the respondent submitted that the two subsequent decisions were not separate decisions but mere extensions of the initial decision. Since this is clearly contradicted by the terms of each notification, the submission is patently unmeritorious. Indeed, it approaches impropriety.

87. I have already referred to the apparent practice of untruthfully attributing to the Secretary-General decisions that were not made by him. This is especially improper where the decision in question is one that only he is legally authorised to make. All three decisions to place the applicant on special leave claimed falsely that it was the Secretary-General who had made this decision and, moreover, fabricated his supposed reasons. More often than not, staff members are not in a position to check on the accuracy of such statements and it is difficult to avoid the impression that the status of the Secretary-General was invoked to intimidate the staff member. It also has the effect of disguising the identity of the official who actually made the decision and therefore enabling personal responsibility to be evaded.

88. The decision to place the applicant on special leave was in breach of the applicant's contract.

Compensation

89. Having agreed to the disposition of the case on the limited issue of the authority to terminate the applicant's contract, the respondent submitted that the issue of compensation would involve the substantive question of the applicant's alleged wrongdoing or other unsuitability for employment. This may be so. Accordingly, the

parties are directed to provide written submissions on the scope of the proposed compensation hearing.

Conclusion

90. The respondent failed to comply with the requirements of staff regulation 9.1 when terminating the applicant's appointment which was accordingly unlawful and in breach of his contract of employment. The placement of the applicant on special leave was also unlawful and in breach of his contract of employment.

91. On or before 26 March 2010, the parties are to file submissions on the scope of the compensation hearing.

(*Signed*)

Judge Michael Adams

Dated this 19th day of March 2010

Entered in the Register on this 19th day of March 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York